MOHD. IRWAN ABDULLAH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL APPEAL NO. 360 OF 1985]
4 APRIL 1986

CRIMINAL LAW AND PROCEDURE: *Appeal by public prosecutor against inadequacy of sentences passed by the Magistrate on accused on three charges for contravening s. 420 of Penal Code - Appeal by accused on ground that the Magistrate had failed to consider certain mitigating factors - Charges do not disclose offences under s. 420 - Whether the Court should frame charges under s. 417 and substitute them for the three charges under s. 420.*

In this case the Public Prosecutor appealed against the inadequacy of the sentences passed by the Magistrate on the accused on three charges for contravening s. 420 of the Penal Code. The accused appealed against such sentences on the ground that the Magistrate had failed to take into consideration certain mitigating factors.

The charges against the accused were that on three occasions in May and July 1985 he had cheated one Swaminathan s/o Hettiar, a marketing executive of the New Straits Times, by deceiving him into believing that three UMBC cheques issued by the accused being payment for advertisements on houses for sale to be published in the Malay Mail would be honoured on presentation which cheques the accused knew would not be honoured as the account was closed on 29 June 1984 and that the said Swaminathan would not have published the said advertisements in the Malay Mail if he had not been so deceived by the accused, and that the accused had thereby committed an offence punishable under s. 420 of the Penal Code.

The accused pleaded guilty to all three charges under s. 420 and admitted the facts given by the prosecution and the Magistrate duly convicted him on all three charges.

Held:

[1] The Court failed to see how the Magistrate could from the charges and the particulars therein and the facts admitted by the accused have convicted him on all three charges under s. 420. The three charges do not disclose offences under s. 420.

[2] As to the question whether the Court should substitute for the three charges under s. 420, charges under s. 417 if the facts appear to disclose offences under s. 417, the Court took note of the Federal Court case of *Sivalingam v. PP* [1982] CLJ (Rep) 330 which has enjoined an appellate Court to be cautious and to exercise such power under limited circumstances. The Court declined to exercise such power in this case as the facts disclosed by the prosecution were insufficient for the Court to arrive at definite findings to frame the substitute charges.

[Conviction of accused on all three charges a nullity. Conviction set aside.]

Case referred to:
Sivalingam v. PP [1982] CLJ (Rep) 330

Legislation referred to:
Penal Code, ss. 415, 417, 420

For the appellant - A.S. Sidhu; M/s. M. Abraham & Co.
For the public prosecutor - Tun Abdul Majid; DPP

JUDGMENT

KC Vohrah J:

In this case the Public Prosecutor has appealed against the inadequacy of the sentences passed by the Magistrate on the accused on three charges for contravening s. 420 of the Penal Code. The accused has also appealed against such sentences on the ground that the Magistrate had failed to take into consideration certain mitigating factors.

On a closer scrutiny of the three charges and the record I am however of the view that the conviction of the accused on all three charges under s. 420 is a nullity and needs to be set aside and I give my reasons for arriving at such a view.

The first charge against the accused reads as follows:

> That you on 15 May 1985 at The New Straits Times No. 31, Jalan Riong, Bangsar, in the Federal Territory of Kuala Lumpur, cheated Swaminathan s/o Hettiar by deceiving him into believing that UMBC cheque No. 116384 for RM136 issued by you being payment for an advertisement on houses for sale to be published in the Malay Mail would be honoured on presentation which cheque you knew would not be honoured as the account was closed on 29 June 1984 and the said Swaminathan a/1 Hettiar would not have published the said advertisement in the Malay Mail if he had not been so deceived by you, and that you have thereby committed an offence punishable under s. 420 of the Penal Code.

The other two charges are identical in their terms with the first charge save for the dates of the offences and the particulars and amounts of the cheques issued specified therein.

The accused pleaded guilty to all three charges. The facts disclosed in the record show that one Swaminathan a/1 Hettiar, a marketing executive, of the New Straits Times had made a report in respect of the three charges. On three occasions, 15 May 1985, 1 July 1985 and 15 July 1985 the accused "telephoned the New Straits Times" requesting for three sets of advertisements for the sale of houses to be published in the "Malay Mail" for three periods from 16 & 17 May 1985, 2 to 4 July 1985 and 16 & 17 July 1985 respectively. The advertisements were so published on the dates requested. Three UMBC cheques were issued by the accused payable to "The New Straits Times" for the advertisements on the dates when accused requested for the advertisements to be published viz., 15 May 1985, 1 July 1985 and 15 July 1985. All the three cheques were returned by UMBC with the legend "Account Closed". On investigation it was discovered that the UMBC as far back as 29 July 1984 had closed the accused's account for "bad operation".

The accused pleaded guilty to all three charges under s. 420 and admitted the facts given by the prosecution and the Magistrate duly convicted him on all three charges.

I fail to see, however, how the Magistrate could from the charges and the particulars therein and the facts admitted by the accused have convicted him on all 3 charges under s. 420.

The three charges do not disclose offences under s. 420.

Under s. 415 of the Penal Code the definition of the offence of cheating is divided into two parts. The first part creates the offence of cheating where, by deception practised upon a victim, the accused dishonestly or fraudulently induces that person to deliver property to any person or to consent that any person shall retain any property.

The other part creates an offence where, by deception practised upon a victim, the accused intentionally induces that person to do or omit to do anything which he would not do or omit to do, if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

The three charges do not state that property was delivered. Nor do facts on the three charges show that property was delivered to anyone. Publication of an advertisement in a newspaper does not constitute delivery of property. Clearly, since one of the two parts of the offence under s. 420 (and we are not concerned with the other part) contains the essential ingredient that the person deceived is induced to deliver any property to any person, and no property was delivered none of the charges under s. 420 can possibly stand in law.

The question arises whether I should substitute for the three charges under s. 420, charges under s. 417 if the facts appear to disclose offences under s. 417. The Federal Court case of *Sivalingam v. PP* [1982] CLJ (Rep) 330 has enjoined an appellate Court to be cautious and to exercise such power under limited circumstances.

I would decline to exercise such power in this case. My reason is that the facts disclosed by the prosecution are insufficient for me to arrive at definite findings to frame the substitute charges. Take the case of the man Swaminathan - he appears to have been deceived as set out in the particulars in the three charges. But on the facts disclosed by the prosecution he happens to have been the man who made the police report regarding the deception. The facts neither show that he was the man who was deceived nor that he authorised the publication of the advertisements. It is not for me to speculate whether it was a clerk or Swaminathan who received the telephone call, was deceived by the false cheques and authorised the publication of the advertisements. Or are there facts which have not been disclosed showing that it was the New Straits Times as a distinct entity with its own legal personality that was deceived within the meaning of s. 415?

In the absence of clear facts before me it would be wrong for me to frame charges under s. 417 and substitute them for the three charges under s. 420. The three charges under s. 420 are bad for not disclosing offences thereunder and the facts too do not disclose offences under s. 420. The conviction of the accused on all three charges is a nullity and should be set aside.

Also found at [1986] 2 CLJ 159